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6 **UNITED STATES DISTRICT COURT**  
7 **DISTRICT OF NEVADA**  
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9 CHRISTOPHER BROWN,  
10 Petitioner,  
11 vs.  
12 E. K. McDANIEL, et al.,  
13 Respondents.

Case No. 3:09-cv-00557-LRH-VPC  
**ORDER**

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15 Before the court are the first amended petition for writ of habeas corpus (#12), respondents'  
16 motion to dismiss (#36), petitioner's opposition (#41), and respondents' reply (#47). The court  
17 finds that petitioner has not shown good cause to excuse the procedural default of some grounds for  
18 relief, and the court grants the motion.

19 Earlier, the court determined that grounds 2(A), 2(B), 2(D), 2(G), 3(B), 3(C), 3(D), and 3(E)  
20 of the first amended petition (#12) were unexhausted. The court stayed the action while petitioner  
21 exhausted his state-court remedies.<sup>1</sup> Order (#28).

22 Petitioner filed another post-conviction habeas corpus petition in the state district court on  
23 June 10, 2010, even before this court stayed the action. Ex. 53 (#32). The state district court  
24 dismissed the petition because it was untimely under Nev. Rev. Stat. § 34.726(1) and successive  
25 under Nev. Rev. Stat. § 34.810. Ex. 62 (#32).

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28 <sup>1</sup>The court also dismissed grounds 3(A) and 5 of the first amended petition (#12) because  
they were procedurally defaulted.

1 Petitioner appealed. While the appeal was pending, the Supreme Court of the United States  
 2 announced the following rule:

3 [W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in  
 4 a collateral proceeding, a prisoner may establish cause for a default of an  
 5 ineffective-assistance claim in two circumstances. The first is where the state courts did not  
 6 appoint counsel in the initial-review collateral proceeding for a claim of ineffective  
 7 assistance at trial. The second is where appointed counsel in the initial-review collateral  
 8 proceeding, where the claim should have been raised, was ineffective under the standards of  
Strickland v. Washington, 466 U.S. 668 (1984). To overcome the default, a prisoner must  
 also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a  
 substantial one, which is to say that the prisoner must demonstrate that the claim has some  
 merit. Cf. Miller-El v. Cockrell, 537 U.S. 322 (2003) (describing standards for certificates  
 of appealability to issue).

9 Martinez v. Ryan, 132 S. Ct. 1309, 1318-19 (2012). The Nevada Supreme Court directed further  
 10 briefing on whether Martinez should apply to showings of cause for the state-law procedural bars of  
 11 § 34.726(1) and § 34.810. Ultimately, in a published opinion, the Nevada Supreme Court declined  
 12 to adopt the Martinez rule for the state-law procedural bars. Ex. 83 (#32).

13 Petitioner then returned to this court. The motion to dismiss (#36) followed.

14 The issue before the court is whether the previously unexhausted grounds 2(A), 2(B), 2(D),  
 15 2(G), 3(B), 3(C), 3(D), and 3(E) now are procedurally defaulted. A federal court will not review a  
 16 claim for habeas corpus relief if the decision of the state court regarding that claim rested on a state-  
 17 law ground that is independent of the federal question and adequate to support the judgment.

18 Coleman v. Thompson, 501 U.S. 722, 730-31 (1991).

19 In all cases in which a state prisoner has defaulted his federal claims in state court  
 20 pursuant to an independent and adequate state procedural rule, federal habeas review  
 21 of the claims is barred unless the prisoner can demonstrate cause for the default and  
 actual prejudice as a result of the alleged violation of federal law, or demonstrate that  
 failure to consider the claims will result in a fundamental miscarriage of justice.

22 Id. at 750; see also Murray v. Carrier, 477 U.S. 478, 485 (1986). The grounds for dismissal upon  
 23 which the Nevada Supreme Court relied in this case are adequate and independent state rules. Vang  
 24 v. Nevada, 329 F.3d 1069, 1074 (9th Cir. 2003) (Nev. Rev. Stat. § 34.810); Loveland v. Hatcher,  
 25 231 F.3d 640 (9th Cir. 2000) (Nev. Rev. Stat. § 34.726); Moran v. McDaniel, 80 F.3d 1261 (9th Cir.  
 26 1996) (same).

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1       To demonstrate cause for a procedural default, the petitioner must “show that some objective  
 2 factor external to the defense impeded” his efforts to comply with the state procedural rule. Carrier,  
 3 477 U.S. at 488.

4       To show prejudice, “[t]he habeas petitioner must show ‘not merely that the errors at . . . trial  
 5 created a possibility of prejudice, but that they worked to his actual and substantial disadvantage,  
 6 infecting his entire trial with error of constitutional dimensions.’” Carrier, 477 U.S. at 494 (quoting  
 7 United States v. Frady, 456 U.S. 152, 170 (1982)) (emphasis in original).

8       The court rejects petitioner’s argument that the procedural default of these grounds was  
 9 inadequate and not independent because the Nevada Supreme Court did not specify what claims  
 10 were procedurally barred. The court agrees with, and adopts, respondents’ argument to the contrary.  
 11 See Reply, at 2-5 (#47). The parties, the Nevada Supreme Court, and this court all know which  
 12 grounds were successive and untimely in state court. They are the grounds that petitioner conceded  
 13 were unexhausted, that petitioner sought to return to state court to exhaust, and that this court did  
 14 not dismiss for other reasons. He admitted to the Nevada Supreme Court that the grounds raised in  
 15 his second state habeas corpus petition were subject to the procedural bars against successive and  
 16 untimely petitions. Ex. 70, at 6 (#32-18). Instead, petitioner argued that Martinez should apply to  
 17 determining whether good cause exists to excuse the procedural bars. In this circumstances of this  
 18 case, this court could conclude easily what grounds were procedurally barred in state court, even if  
 19 this court did not have petitioner’s own admissions in this court and in state court.

20       The court also rejects petitioner’s arguments that none of the grounds at issue are  
 21 procedurally defaulted because the Nevada Supreme Court in this case departed from its consistent  
 22 adoption of federal standards of cause to excuse the operation of state-law procedural bars. This  
 23 argument is not relevant to the claims at issue in ground 3, because those are claims of trial-court  
 24 error, and Martinez does not apply to such claims. The claims at issue in ground 2 are claims of  
 25 ineffective assistance of trial counsel or appellate counsel. Martinez can apply to them.<sup>2</sup> With

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27       <sup>2</sup>The court of appeals has extended the rule in Martinez to procedurally defaulted claims of  
 28 ineffective assistance of appellate counsel. Ha Van Nguyen v. Curry, 736 F.3d 1287 (9th Cir.  
 2013).

1 respect to the claims in ground 2 to which Martinez applies, the solution is for the court to apply  
 2 Martinez.

3 Ground 2(A) is a claim that trial counsel provided ineffective assistance because trial  
 4 counsel did not request a jury instruction that defined willfulness, deliberation, and premeditation,  
 5 all elements of first-degree murder. Petitioner also claims that appellate counsel failed to raise the  
 6 issue on direct appeal. The trial court gave the following instruction to the jury:

7 The unlawful killing must be accompanied with a deliberate and clear intent to take life in  
 8 order to constitute murder of the first degree. The intent to kill must be the result of  
 9 deliberate premeditation. There need be no appreciable space of time between the intention  
 10 to kill and the act of killing; they may be as instantaneous as successive thoughts of the  
 11 mind. It is only necessary that the act of killing be preceded by a concurrence of will,  
 12 deliberation, and premeditation on the part of the slayer and, if such is the case, the killing is  
 13 murder in the first degree, no matter how rapidly these acts of the mind may succeed each  
 14 other, or how quickly they may be followed by the act of killing.

15 The element of intention alone, as an element of the offense, may be ascertained or deduced  
 16 from the facts and circumstances of the killing.

17 Ex. 19, Instruction 18 (#13). In Byford v. State, 994 P.2d 700 (Nev. 2000), the Nevada Supreme  
 18 Court noted that over the previous decade it had approved a jury instruction that defined the element  
 19 of premeditation but did not define the element of deliberation.<sup>3</sup> Deliberation thus became a  
 20 redundant synonym to premeditation. Id. at 713. The Nevada Supreme Court abandoned the  
 21 Kazalyn instruction in Byford. Id. The court held:

22 Because deliberation is a distinct element of mens rea for first-degree murder, we direct the  
 23 district courts to cease instructing juries that a killing resulting from premeditation is  
 24 “willful, deliberate, and premeditated murder.” Further, if a jury is instructed separately on  
 25 the meaning of premeditation, it should also be instructed on the meaning of deliberation.

26 Id. at 714 (emphasis added). The Nevada Supreme Court then noted, “Instructions defining  
 27 deliberation and premeditation are not even required.” Id. at 714 n.3 (2000). The Nevada Supreme  
 28 Court gave a set of standard instructions that defined willfulness, deliberation, and premeditation.  
 29 However, the Nevada Supreme Court did not hold that those instructions must always be given in a

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<sup>3</sup>The instruction is known as the Kazalyn instruction because it first appeared in the Nevada Supreme Court’s case law in Kazalyn v. State, 825 P.2d 578, 583 (Nev. 1992). The Nevada Supreme Court actually approved of the instruction later the same year in Powell v. State, 838 P.2d 921, 926-27 (Nev. 1992).

1 murder trial, but just when the trial court defines the elements of premeditation, deliberation, and  
 2 willfulness. “Before Kazalyn, it appears that ‘deliberate’ and ‘premeditated’ were both included in  
 3 jury instructions without being individually defined but also without ‘deliberate’ being reduced to a  
 4 synonym of ‘premeditated.’” Id. at 713. The Nevada Supreme Court did not abandon that type of  
 5 jury instruction. The Nevada Supreme Court cited State v. Harris, 12 Nev. 414, 416 (1877), as an  
 6 example of that type of acceptable instruction. The acceptable instruction given in Harris is the  
 7 same, almost word for word, as instruction 18 given in petitioner’s trial. Any objection to  
 8 instruction 18, either by trial counsel or appellate counsel, would have failed, and ground 2(A) does  
 9 not present a substantial claim of ineffective assistance of counsel.

10 In ground 2(B), petitioner argues that trial counsel and appellate counsel should have  
 11 challenged the instruction defining implied malice because it appeared to create a mandatory  
 12 presumption. The jury found petitioner guilty of first degree murder. Implied malice is not a  
 13 component of first degree murder. See Nev. Rev. Stat. § 200.010. Any error in the instruction was  
 14 irrelevant. Ficklin v. Hatcher, 177 F.3d 1147, 1151 (9th Cir. 1999). A claim that counsel provided  
 15 ineffective assistance by not objecting to an instruction that the jury did not use is insubstantial.

16 Ground 2(G)<sup>4</sup> is a claim that trial counsel did not present a defense based on a lack of  
 17 specific intent due to voluntary intoxication, did not proffer a jury instruction on involuntary  
 18 intoxication, and did not object to the instruction on voluntary intoxication that the trial court gave  
 19 to the jury. Petitioner raised this claim in his first state habeas corpus petition. The state district  
 20 court denied the ground on its merits. Ex. 37, at 4 (#14). Ground 2(G) was unexhausted because  
 21 petitioner did not present the claim to the Nevada Supreme Court on appeal from the denial of the  
 22 state habeas corpus petition. When petitioner raised the issue in his second state habeas corpus  
 23 petition, the Nevada Supreme Court determined that it was procedurally barred as untimely and  
 24 successive under Nev. Rev. Stat. §§ 34.726(1) and 34.810. Ex. 83, at 4-5 (#32).

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 27 <sup>4</sup>The court discusses ground 2(G) before ground 2(D) because the procedural default of  
 28 ground 2(D) is more complicated and because the court’s discussion of ground 2(G) applies to part  
 of ground 2(D).

1       Martinez is inapplicable to the procedural default of ground 2(G). Ground 2(G) is not  
 2 procedurally defaulted because post-conviction counsel did not raise the claim before the state  
 3 district court in his first state habeas corpus petition. Ground 2(G) is procedurally defaulted because  
 4 post-conviction appellate counsel did not appeal to the Nevada Supreme Court the denial of this  
 5 claim on its merits. Martinez specifically excluded this situation from its holding. “The holding in  
 6 this case does not concern attorney errors in other kinds of proceedings, including appeals from  
 7 initial-review collateral proceedings . . . .” 132 S. Ct. at 1320. Petitioner has presented no other  
 8 argument for cause and prejudice to excuse the procedural default of ground 2(G), and the court  
 9 dismisses ground 2(G).

10       Ground 2(D) has two components. First, petitioner argues that trial counsel did not prepare  
 11 a defense of self-defense and that trial counsel did not proffer a jury instruction that petitioner did  
 12 not have a duty to retreat. Petitioner raised this part of ground 2(D) in his first state habeas corpus  
 13 petition. The state district court denied this part of ground 2(D) on its merits. Ex. 37, at 3 (#14).  
 14 Petitioner did not raise this part of ground 2(D) on appeal from the denial of the first state habeas  
 15 corpus petition, and it was unexhausted. When petitioner raised the issue in his second state habeas  
 16 corpus petition, the Nevada Supreme Court determined that it was procedurally barred as untimely  
 17 and successive under Nev. Rev. Stat. §§ 34.726(1) and 34.810. Ex. 83, at 4-5 (#32). For the reasons  
 18 stated immediately above with respect to ground 2(G), this part of ground 2(D) is procedurally  
 19 defaulted, and petitioner has not shown cause to overcome the default.

20       The second part of ground 2(D) is a claim of ineffective assistance of appellate counsel. In  
 21 the heading, petitioner states, “appellate counsel was ineffective for failing to challenge the  
 22 instructions on appeal.” First Amended Petition, at 19 (#12). In the body of the ground, petitioner’s  
 23 allegations regarding appellate counsel are, in full:

24       Likewise, appellate counsel’s failure in this regard fell below the constitutionally required  
 25 minimum standard of reasonably effective assistance of counsel and could serve no strategic  
 26 nor tactical purpose that would assist Brown. Brown suffered prejudice as he was denied his  
 27 right to have competent counsel represent his interests during this vital stage of the  
 28 proceedings.

1     *Id.* at 20 (#12). Most of the body of the ground supports the claim that trial counsel did not prepare  
 2     a defense of self-defense and did not proffer an instruction that petitioner had no duty to retreat.  
 3     Petitioner does not allege anywhere in the ground what instructions appellate counsel should have  
 4     challenged, and the paragraph quoted above actually does not describe what appellate counsel  
 5     should have done. The best that the court can construe from the allegations is that appellate counsel  
 6     should have challenged on appeal the lack of a instruction about petitioner not having a duty to  
 7     retreat. However, it was trial counsel's duty to proffer that instruction. In effect, appellate counsel  
 8     would have needed to argue that trial counsel was ineffective, and Nevada generally does not allow  
 9     claims of ineffective assistance of counsel to be raised on direct appeal. Gibbons v. State, 634 P.2d  
 10    1214, 1216 (Nev. 1981). The claim of ineffective assistance of appellate counsel in ground 2(D) is  
 11    insubstantial.

12           Ground 2(D) as a whole is procedurally defaulted, and the court dismisses it.

13           Grounds 3(B), 3(C), 3(D), and 3(E) are procedurally defaulted. These are claims of trial-  
 14    court error. Petitioner argues that ineffective assistance of counsel is cause to overcome the  
 15    procedural defaults.

16           Grounds 3(C) and 3(E) are the claims underlying the claims of ineffective assistance of  
 17    counsel in grounds 2(B) and 2(G). However, for the reasons discussed above, grounds 2(B) and  
 18    2(G) are procedurally defaulted, and the court is dismissing them. Grounds 2(B) and 2(G) cannot be  
 19    cause to excuse the procedural defaults of grounds 3(C) and 3(E). Edwards v. Carpenter, 529 U.S.  
 20    446, 452-53 (2000). The court dismisses grounds 3(C) and 3(E).<sup>5</sup>

21           Grounds 3(B) and 3(D) are the claims underlying the claims of ineffective assistance of  
 22    counsel in 2(E) and 2(C), respectively. Ground 3(B) is a claim that the trial court erred in its jury  
 23    instructions regarding the definition of manslaughter, the difference between involuntary and

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 26           <sup>5</sup>The court already has dismissed ground 3(A) as procedurally defaulted. Order, at 4-5 (#28).  
 27    Petitioner argues that he could show cause to overcome the default through the claim of ineffective  
 28    assistance of counsel in ground 2(A). However, the court has determined that ground 2(A) is  
 29    procedurally defaulted. Petitioner could not succeed with this argument.

30           Petitioner did not make this argument in his opposition to the first motion to dismiss.  
 31    Instead, he argued that ground 3(A) was not procedurally defaulted. Opposition, at 20 (#24).

1 voluntary manslaughter, and on the “heat of passion” theory. Ground 3(D) is a claim that the trial  
2 court erred when it did not instruct the jury on how to proceed in its deliberations from first-degree  
3 murder, to second-degree murder, to voluntary manslaughter, to involuntary manslaughter. The  
4 ineffective-assistance claims related to these grounds are exhausted and not procedurally defaulted.  
5 The court agrees with petitioner that the more efficient method is to litigate the merits of the  
6 ineffective-assistance claims in an answer and reply. Respondents may maintain their argument that  
7 grounds 3(B) and 3(D) are procedurally defaulted in their answer.

8 IT IS THEREFORE ORDERED that respondents’ motion to dismiss (#36) is **GRANTED** in  
9 part. Grounds 2(A), 2(B), 2(D), 2(G), 3(C), and 3(E) are **DISMISSED** with prejudice because they  
10 are procedurally defaulted.

11 IT IS FURTHER ORDERED that respondents shall have forty-five (45) days from the date  
12 of entry of this order to file and serve an answer, which shall comply with Rule 5 of the Rules  
13 Governing Section 2254 Cases in the United States District Courts. Petitioner shall have forty-five  
14 (45) days from the date on which the answer is served to file a reply.

15 DATED this 1st day of February, 2016.

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18 LARRY R. HICKS  
19 UNITED STATES DISTRICT JUDGE  
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